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No. 90-1208

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. PEARSON AND IDA J. PEARSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 106(c) of the Bankruptcy Code (11 U.S.C.), waives the sovereign immunity of the United States from claims for money damages based on violations of the automatic stay provision of the Code, 11 U.S.C. 362.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 917 F.2d 1215. The opinion of the district court (Pet. App. A7-A13), and the opinions of the bankruptcy court (Pet. App. A14-A29), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1990. The petition for a writ of certiorari was filed on January 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 15, 1985, petitioners filed a petition for relief under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Oregon. In the schedules that accompanied the petition, petitioners listed an obligation owing to the Internal Revenue Service for the tax year 1981. C.A. E.R. 34.

The IRS Special Procedures Branch in Portland, Oregon, received notice of petitioners' bankruptcy petition on April 9, 1985, but did not receive a copy of the schedules listing the IRS as a creditor until sometime later. The Special Procedures Branch asked the IRS Service Center in Ogden, Utah, to determine whether petitioners had any outstanding tax liabilities. The Ogden Service Center checked its records and reported that it found no outstanding liabilities. The Portland Special Procedures Branch accordingly did not file a proof of claim in the Chapter 13 proceeding and closed its file on the bankruptcy proceeding. C.A. E.R. 34-35.

On April 15, 1985, the IRS assessed a deficiency in petitioners' federal income tax liability for tax year 1981. That assessment was made by a third IRS office—the Examination Division in San Jose, California—*after* the Ogden Service Center had checked its records at the request of the Portland Special Procedures Branch. C.A. E.R. 35.

Petitioners' Chapter 13 plan was confirmed by the Bankruptcy Court on May 16, 1985. On July 19, 1985, the IRS Collection Division in San Jose sent petitioners a request for payment of the 1981 deficiency. On July 30, 1985, petitioners' attorney mailed a notice of the bankruptcy to the Ogden Service Center. That notice was forwarded to the Portland Spe-

cial Procedures Branch, but it did not reach Special Procedures until after the IRS Collection Division had sent petitioners a second demand for payment of the 1981 assessment. On September 12, 1985, having by then received notice of the bankruptcy, Portland Special Procedures posted a "freeze" code to petitioners' 1981 account and all collection efforts ceased. C.A. E.R. 35-36.

Thereafter, Portland Special Procedures erroneously advised the Ogden Service Center that petitioners' bankruptcy case had been closed. The IRS then released the "freeze" code on petitioners' 1981 tax account and resumed collection efforts. C.A. E.R. 36-37, 102-105, 135-136.[1]

2. Petitioners initiated adversary proceedings in the bankruptcy court, seeking to hold the IRS in contempt for violating the automatic stay provision of the Code, 11 U.S.C. 362(a), and to recover general and punitive damages and attorneys' fees under Section 362(h) of the Code. The court found that willful violations of the automatic stay provision had occurred, and on this basis awarded petitioners damages and attorneys' fees.[2] The court also held that the

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[1] On March 14, 1986, the IRS sent petitioners a notice of intention to levy and a further request for payment of the 1981 tax liability. On April 15, 1986, the IRS offset petitioners' 1985 income tax refund in the amount of $825 against their unpaid income tax liability for tax year 1981. On February 16, 1987, a past due notice was sent by the IRS to petitioners requesting payment of their 1981 tax liability, together with notices of the IRS's intention to levy on and to file tax liens against their property. Finally, on March 20, 1987, the IRS offset petitioners' income tax refund for 1986 in the amount of $620 against the unpaid 1981 tax liability. C.A. E.R. 36-37, 102-105, 135-136.

[2] There were two separate proceedings in the bankruptcy court. Pet. App. A14-A25, A26-A29. The later-commenced

government had waived its sovereign immunity to monetary recovery under Section 106(c) of the Code. Pet. App. A14-A16, A25, A26-A29.[3]

3. The district court reversed and entered judgment in favor of the United States. Pet. App. A6-A13. It held that petitioners' action for money damages was barred by sovereign immunity. In so holding, the court determined that Section 106(c) did not waive the United States' sovereign immunity from retroactive monetary relief. The court relied on this Court's decision in *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818 (1989), in which the Court held that Section 106(c) does not abrogate the States' immunity under the Eleventh Amendment from retroactive monetary recovery. The district court here adopted the interpretation of Section 106(c) set forth in the plurality opinion in *Hoffman*, which construed Section 106(c) "as not authorizing monetary recovery from the states." Pet. App. A11-A12 (quoting *Hoffman*, 109 S. Ct. at 2823).

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proceeding concerned alleged violations of the automatic stay that occurred after the first proceeding had been commenced. In each proceeding, the bankruptcy court refused petitioners' request for punitive damages, finding that petitioners had failed to show that such damages were warranted. *Id.* at A16, A29. The two proceedings were consolidated on appeal to the district court.

[3] 11 U.S.C. 106(c) provides:

> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

This interpretation, the district court held, also applied to bar recovery against the United States. *Id.* at A12.

4. The court of appeals affirmed the district court's judgment. Pet. App. A1-A5. The court (Kozinski, J.) found it unnecessary to decide whether, as a general matter, Section 106(c) authorizes monetary recovery from the United States. Pet. App. A3-A4. The court held, instead, that Section 106(c) does not waive sovereign immunity from claims based on violations of the automatic stay provision, Section 362(a). Pet. App. A4. The court based this holding on the fact that the provision authorizing damages for violations of the automatic stay, Section 362(h), does not contain any of the three "trigger" words specified in Section 106(c). Pet. App. A4.

The court observed that, based on the plurality and dissenting opinions in *Hoffman*, its holding that relief was barred would likely be shared by a majority of this Court. While *Hoffman* concerned the immunity of the States, the court of appeals determined that "the plurality's reasoning [in *Hoffman*] is equally applicable to the immunity of the United States." Pet. App. A3 (citing *SPA* v. *Rinehart*, 887 F.2d 165, 170 (8th Cir. 1989)). Further, Justice Marshall's dissenting opinion in *Hoffman* "noted that * * * section 362(h), does not include any of the three magic words of section 106(c), and therefore does not apply to governmental units." Pet. App. A4 (citing *Hoffman*, 109 S. Ct. at 2826 n.4).

DISCUSSION

In our view, the court of appeals' decision is correct. Moreover, the decision does not conflict with the decisions of any other court of appeals. We therefore believe that plenary review by this Court is unwar-

ranted. At the same time, we recognize that the court of appeals' reasoning implicates an issue of significant importance on which the courts of appeals *are* divided—namely, whether Section 106(c) of the Bankruptcy Code waives the sovereign immunity of the United States from retroactive monetary relief. That issue is squarely presented in a case in which the United States has petitioned for certiorari, *United States* v. *Nordic Village, Inc.*, decision below, 915 F.2d 1049 (6th Cir. 1990), petition for cert. pending. Accordingly, we believe it is appropriate for the Court to hold the petition filed herein pending disposition of the petition in *Nordic Village*.

Section 106(c) provides that provisions of the Bankruptcy Code that contain any of three "trigger" words—"creditor," "entity," or "governmental unit" —apply to governmental units. 11 U.S.C. 106(c)(1). The court of appeals here held that Section 106(c) does not authorize awards of damages for violations of the automatic stay provision, 11 U.S.C. 362(a), because the provision authorizing damages for such violations, 11 U.S.C. 362(h), does not contain a trigger word. In light of this determination—which in our view represents a straightforward reading of Section 106(c)—the court of appeals did not decide the broader issue whether, as a general matter, Section 106(c) authorizes monetary awards against the federal government.

Nonetheless, that broader issue was implicated in the decision below. The court of appeals relied in part on its understanding of this Court's decision in *Hoffman*. The court below determined that its holding—that relief was not authorized under Section 106(c)—was supported by both Justice White's opinion for a plurality of the Court in *Hoffman* and Justice Marshall's dissenting opinion in that case. The

plurality's reasoning with regard to the States' Eleventh Amendment immunity was "equally applicable to the immunity of the United States" (Pet. App. A3). Also applicable, the court below determined, was the observation in the *Hoffman* dissent that because Section 362(h) lacks a trigger word, it does not apply to governmental units. Pet. App. A4.

Accordingly, we believe that there is no need for the Court to grant plenary review in the present case, but that it would be appropriate for the Court to hold this case pending the outcome in *Nordic Village*.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's disposition of *United States* v. *Nordic Village, Inc.*[4]

Respectfully submitted.

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[4] We are supplying petitioners' counsel in this case with copies of our petition in *Nordic Village*.

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